91-833

NO.

in the

Supreme Court

of the

United States of America

Fall Term, 1991

GERALD J. CROWLEY,

Petitioner,

vs.

BARNETT BANK OF PASCO COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

DID THE DISTRICT COURT'S SUBSEQUENT ISSUANCE OF A CERTIFICATE PURSUANT TO RULE 54 (B), FEDERAL RULES OF CIVIL PROCEDURE, CURE THE JURISDICTIONAL DEFECT CAUSED BY THE PETITIONER'S PREMATURE NOTICE OF APPEAL FROM THE DISTRICT COURT'S JUDGMENT?

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OPINION BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit is reprinted as Appendix A.[1] The court dismissed Petitioner's appeal for lack of jurisdiction caused by Petitioner's premature appeal.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 18, 1991. On June 24, 1991, petitioner timely filed a Petition for Rehearing. [2] The court below entered an order denying the petition on August 19, 1991. [3] This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1291, Title 28, U.S. Code, is entitled "Final decisions of district courts" and provides:

> "The courts of appeals (other than the United states Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdicition described in sections 1292(c) and (d) and 1295 of this title."

---

[1] The June 18, 1991, judgment of the United States Court of Appeals for the Eleventh Circuit is reprinted as Appendix A.

[2] The June 24, 1991, Petition for Rehearing is reprinted as Appendix B.

[3] The August 19, 1991, order of the United States Court of Appeals for the Eleventh Circuit denying the petition is reprinted as Appendix C.

Rule 54(b), Federal Rules of Civil Procedure, is entitled "Judgment Upon Multiple Claims or Involving Multiple Parties" and provides:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicated fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Rule 4(a), Federal Rules of Appellate Procedure, pertains to appeals in civil cases and in pertinent part provides:

> "(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from;...
>
> "(2) Except as provided in (a) (4) of this Rule 4, a notice of appeal filed after the commencement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof..."

STATEMENT OF THE FACTS

The District Court for the Middle District of Florida, in an action entitled Gerald J. Crowley v. Norman Errington, et al., Case No. 89-410-Civ-T-17(A), on February 19, 1991, entered an order denying Petitioner's motion to vacate the District Court's January 29, 1990, order striking Count III of Petitioner's Third Amended Complaint, the only count directed to Respondent Barnett Bank of Pasco County.[4]

In its order of February 19, 1991, the District Court directed the Clerk of the Court to enter a judgment for Respondent. However, the District Court's February 19, 1991, order did not make "an express determination that there is no just reason for delay", as contemplated by Rule 54(b), Federal Rules of Civil Procedure. The jugment in favor of Respondent was entered that same date.[5]

Petitioner, on March 4, 1991, filed his notice of appeal from the February 19, 1991, judgment with the Clerk of the District Court.[6]

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[4] The February 19, 1991, District Court order denying Petitioner's motion to vacate is reprinted as Appendix D.

[5] The February 19, 1991, District Court judgment for Respondent is reprinted as Appendix E.

[6] The March 4, 1991, notice of appeal by Petitioner is reprinted as Appendix F

Respondent, on March 13,1991, moved in the District Court for the issuance of a certificate under Rule 54 (b), Federal Rules of Civil Procedure.[7] Petitioner, on March 21, 1991, responded to Respondent's March 13, 1991, motion by asking for the identical relief.[8]

The District Court, on April 8, 1991, issued a certificate under Rule 54(b), Federal Rules of Civil Procedure, determining that there existed "no just reason for delay."[9] By letter dated April 15, 1991, Petitioner's undersigned attorneys forwarded a copy of the District Court's April 8, 1991, Rule 54(b) certificate to the Clerk of the Court of Appeals for the Eleventh Circuit.[10]

The Court of Appeals for the Eleventh Circuit, on June 18, 1991, dismissed Petitioner's appeal for lack of jurisdiction and stated:

> "This appeal is DISMISSED for lack of jurisdiction. The district court's order and judgment entered February 19, 1991, were not final and appealable because they failed to dispose of all the claims of all of the parties to the action and the court failed to make an express determination that there was not just reason for delaying the entry of judgment, 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); In Re Yarn Processing Patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1982) (per curiam)."

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[7] The March 13, 1991, motion by Respondent for the issuance of a Rule 54(b) certificate is reprinted as Appendix G.

[8] The March 21, 1991, motion by Petitioner for the issuance of a Rule 54(b) certificate is reprinted as Appendix H.

[9] The District Court's, April 8, 1991, order issuing a certificate under Rule 54(b) is reprinted as Appendix I.

[10] The April 15, 1991 letter from Petitioner's attorneys to the Clerk of the Court of the Eleventh Circuit Court of Appeals is reprinted as Appendix J.

JURISDICTION BELOW

The District Court for the Middle District of Florida had jurisdiction over these claims under 28 U.S.C. §1332.

ARGUMENT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL BECAUSE OF A JURISDICTIONAL DEFECT CREATED BY HIS PREMATURE NOTICE OF APPEAL WAS IN DIRECT CONFLICT WITH THE DECISIONS OF A MAJORITY OF THE OTHER CIRCUITS THAT HAVE RULED ON THIS ISSUE.

The Eleventh Circuit Court of Appeals' dismissal of Petitioner's appeal should be reviewed because it conflicts with the decisions of a majority of the other Circuits that have ruled on the issue of whether the District Court's subsequent issuance of a certificate under Rule 54(b), Federal Rules of Civil Procedure, cures the jurisdictional defect created by a premature appeal.

The Eleventh Circuit, relying on its decision in In re Yarn Processing patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1982) (per curiam) , denied Petitioner's appeal for lack of jurisdiction. The Court held that the issuance of a certificate under Rule 54(b), Federal Rules of Civil Procedure, did not cure the jurisdictional defect created by petitioner's premature notice of appeal.

The Eleventh Circuit, in In re Yarn Processing Patent Validity Litigation, supra, dismissed consolidated appeals from the District Court's judgments dismissing third party complaints for contribution or indemnity. Noting that the District Court had not made "an express determination that there is no just reaon for delay", the Court reasoned:

"In the cases at bar, the district court entered judgments dismissing Lex Tex's third party complaints against Leesona, but failed in each case to make any determination that there existed no just reason for delay in allowing appeals to be taken from the dismissal orders. Although the district court is not required, in every case, to express its reasons for concluding that there is no just reason for delay,...the district court must exercise its discretion and enter a Rule 54(b) certification determining that there is no just reason for delay and directing entry of a judgment before an appeal may be taken. Because the district court did not so exercise its discretion under Rule 54(b), the orders dismissing the third party complaints are not appealable final judgments. Finding no other basis upon which we may exercise jurisdiction, we must dismiss these appeals for want of jurisdiction."[11] (Citation omitted)

680 F.2d at 1340. The court conclued that In re Yarn Processing Patent Validity Litigation, supra, was controlling and that Petitioner's appeal be dismissed for lack of jurisdiction.

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[11] The Eleventh Circuit, In In re Yarn Processing Patent Validity Litigation, supra, suggested the following post-dismissal course of action:

"The parties, are, of course, free to seek new judgments with proper Rule 54(b) certification. In accordance with the procedure utilized by the former Fifth Circuit in General Motors Corp v. Dade Bonded Warehouse, Inc., 498 F.2d 327 (5th Cir. 1974), on subsequent appeal, 505 F.2d 1305 (5th Cir. 1975), should the district court enter final judgments under Rule 54(b), the parties may, after filing new notices of appeal, request the the appeals from those judgments be submitted on the records and briefs prepared in these actions, supplemented with the new judgments and Rule 54(b) certificates, and on the oral argument previously heard before this panel."

680 F.2d at 1340.

However, the holding of the Eleventh Circuit is in conflict with the decisions of a majority of the other Circuits that have ruled on this issue. Professors Wright and Miller, in their treatise Federal Practice and Procedure, have observed that:

> "Most circuits have ruled that Rule 54(b) certification is sufficient to validate a premature notice of appeal." Volume 10, §2660 (West Supp. 1986)

In Metallurgical Industries, Inc. v. Fourtek, Inc, 771 F.2d 915 (5th Cir. 1985) the Fifth Circuit declared:

> "When an appellant notices appeal from an interlocutory order and subsequently obtains a certificate pursuant to Fed.R.Civ.P 54(b) for appeal of the prior order, must a new notice of appeal be filed after entry of the Rule 54(b) order: Our answer: a new notice is not prerequisite to our jurisdiction.
>
> * * * * * *
>
> "Fortunately, we have the holding of Alcorn County, Miss. v. U.S. Interstate Supplies, 731 F.2d 1160 (1984) to support us in giving effect to the premature notice of appeal. This result is in the spirit of Fed.R.App.4(a)(2) and is not contrary to any words of the Rule. When the only object of the rule 54(b) order is to make the original order appealable, our jurisdiction should be sustained under several theories..."

771 F.2d at 915-916. Similarly in Tidler v. Eli Lilly and Company, Inc., 824 F.2d 84 (D.C. Cir. 1987), the Court of

Appeals held that the District Court's certification under Rule 54(b) was sufficient to validate a premature notice of appeal absent a showing of prejudice to the appellee.[12]

In the case at bar, the Respondent would not be prejudiced by the reinstatement of Petitioner's appeal. It was Respondent, not Petitioner, which on March 13, 1991, first called to the District Court's attention the absence of "no just reason for delay language" from the February 19, 1991, order denying Petitioner's motion to vacate.

In light of the aforementioned decisions, the District Court's subsequent issuance of a certificate under Rule 54(b), Federal Rules of Civil Procedure, cured the jurisdictional defect created by the prematurity of Petitioner's appeal and rendered inapplicable the procedure suggested in In re Yarn Processing Patent Validity Litigation., supra, fn. 10.

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[12] Also see: Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988); Lac Courte Orielles Bank v. State of Wisconsin, 760 F.2d 177 (7th Cir. 1985); Tilden Financial Corporation v. Palo Tire Services, Inc., 596 F.2d 604 (3rd Cir. 1979); Freeman v. Hittle, 747 F.2d 1299 (9th Cir. 1984); Martinez v. Arrow Truck Sales, Inc., 865 F.2d 160 (8th Cir. 1988).

II. UNDER RULE 4(a)(2), FEDERAL RULES OF APPELLATE PROCEDURE, THE DISTRICT COURT'S DISMISSAL OF ALL OTHER CLAIMS AFTER PETITIONER'S NOTICE OF APPEAL HAD BEEN FILED SERVED TO RIPEN AND SAVE PETITIONER'S APPEAL.

In a situation analogous to the one at bar, this Court held that subsequent events can validate premature appeals. This Court, in FirsTier Mortgage Co. v. Investors Mortgage Insurance Company, ___U.S.____, 111 S. Ct. 648 (1991), held that the district court's bench ruling was a "decision" under Rule 4(a)(2), Federal Rules of Appellate Procedure, thereby validating the appellant's premature notice of appeal therefore. Reversing the Ninth Circuit's dismissal of the appeal of FirsTier Morgage Co., this Court stated:

> "This is not to say the Rule 4(a)(2) permits notice of appeal from a clearly interlocutory decision such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would not be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a non-final decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting notice of appeal to become effective when judgment is entered does not catch the appellee by surprise. Little would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal...
>
> "Applying this principle to the case at hand, we conclude that the District Court's January 26 bench ruling was a

'decision' for purposes of Rule 4(a)(2). Even assuming that the January 26 bench ruling was not final because the District Court could have changed its mind prior to entry of judgment, the fact remains that the bench ruling did announce a decision purporting to dispose of all of FirsTier's claims. Had the judge set forth the judgment immediately following the bench ruling, and had the clerk entered the judgment on the docket, see Fed.Rules Civ.Porc. 58 and 79(a), there is no question that the bench ruling would have been 'final' under §1291. Under such circumstances, FirsTier's belief in the finality of the January 26 bench ruling was reasonable, and its premature February 8 notice therefore should be treated as an effective notice of appeal from the judgment entered on March 3.

"In reaching our conclusion, we observe that this case presents precisely the situation contemplated by Rule 4(a)(2)'s drafters. FirsTier's confusion as to the status of the litigation was understandable. By its February 8 notice of appeal, FirsTier clearly sought, albeit inartfully, to appeal from the judgment that in fact was entered on March 3. No unfairness to (respondent) IMI results from allowing the appeal to go forward." (Footnotes omitted)

___U.S. at _____, 111 S.Ct. at 653.[13]

Petitioner's March 4, 1991, notice of appeal was a "reasonable" response, under FirsTier Mortgage Company, supra, to the District Court's February 19, 1991, judgment in favor of

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[13] Also See: Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962); Lemke v. United States, 346 U.S. 325, 74 S.Ct. 1 (1953).

Respondent. The District Court, in its February 19, 1991, order denying Petitioner's motion to vacate, directed the Clerk to enter a judgment in Respondent's favor. The Clerk, in compliance with the District Court's February 19, 1991, order denying Petitioner's motion to vacate, entered a judgment in favor of Respondent "on a separate document", as required by Rule 58, Federal Rules of Civil Procedure.

The District Court's February 19, 1991, entrance of a judgment was a "decision" pursuant to Rule 4(a)(2), Federal Rules of Appellate Procedure, and its April 8, 1991 order, served to confirm the Court of Appeals' jurisdiction in this matter.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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By:_____
LAWRENCE R. METSCH

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition For Writ of Certiorari were mailed this _____day of November, 1991, to Wayne Thomas, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Attorneys for Respondent, P.O. Box 3239, Miami, Florida 33601, (813)223-7000.

_____

LAWRENCE R. METSCH

NO.

in the

Supreme Court

of the

United States of America

Fall Term, 1991

GERALD J. CROWLEY,

Petitioner,

vs.

BARNETT BANK OF PASCO COUNTY,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3210

GERALD J. CROWLEY,

Plaintiff-Appellant,

versus

NORMAN ERRINGTON, et al.,

Defendants,

BARNETT BANK OF PASCO COUNTY,
a Florida Corporaion,

Defendant-Appellee.

Appeal from the United Stated District Court for the
Middle District of Florida

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, circuit Judges.

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. The district court's order and judgment entered February 19, 1991, were not final and appealable because they failed to dispose of al the claims of all the parties to the action and the court failed to make an express determination that there was no just reason for delaying the entry of judgment. 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1982) (per curiam).

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 91-3210

GERALD J. CROWLEY,

Plaintiff-Appellant,

v.

NORMAN ERRINGTON, et al.,

Defendants,

BARNETT BANK OF PASCO COUNTY, etc.,

Defendant-Appellee.

APPELLANT'S MOTION FOR REHEARING AND FOR REINSTATEMENT OF APPEAL AND SUPPORTING MEMORANDUM OF LAW

Plaintiff-Appellant Gerald J. Crowley ("Crowley"), pursuant to Rule 40, Federal Rules of Appellate Procedure, respectfully moves for a rehearing of this Court's June 18, 1991, order dismissing his appeal and for the reinstatement of his appeal. As established in the memorandum of law which follows, the United States District Court for the Middle District of Florida's issuance on April 8, 1991, of a certificate under Rule 54(b), Federal Rules of Civil Procedure, cured the prematurity of Crowley's March 4, 1991, notice of appeal from the District Court's February 19, 1991, judgment and confirmed the subject-matter jurisdiction of this court.

APPENDIX "B"

MEMORANDUM OF LAW

I THE RECORD FACTS

The District Court, in an action entitled Gerald J. Crowley v. Norman Errington, et al., Case No. 89-410-Civ-T-17(A), on February 19, 1991, entered an order denying Crowley's motion to vacate the District Court's January 29, 1990, order striking Count III of Crowley's Third Amended Complaint, the only count directed to Defendant-Appellee Barnett Bank of Pasco County ("Barnett Bank").[1]

In its order of February 19, 1991, the District Court directed the Clerk of the Court to enter a judgment for Barnett Bank. However, the District Court's February 9, 1991, order did not make "an express determination that there is no just reason for delay", as contemplated by Rule 54(b), Federal Rules of Civil Procedure. The judgment in favor of Barnett Bank was entered that same date.[2]

Crowley, on March 4, 1991, filed his notice of appeal from the February 19, 1991, judgment with the Clerk of the District Court.[3]

Barnett Bank, on March 13, 1991, moved in the District Court for the issuance of a certificate under Rule 54(b), Federal Rules

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[1] A copy of the District Court's "Order On Motion To Vacate" is attached hereto as Exhibit "A".

[2] A copy of the District Court's February 19, 1991, judgment in favor of Barnett Bank is attached hereto as Exhibit "B".

[3] A Copy of Crowley's March 4, 1991, notice of appeal is attached hereto as Exhibit "C".

of Civil Procedure.[4] Crowley, on March 21, 1991, responded to Barnett Bank's March 13, 1991, motion by asking for the identical relief.[5]

The District Court, on April 8, 1991, issued a certificate undr Rule 54(b), Federal Rules of Civil Procedure, determining that there existed "no just reason for delay".[6] By letter dated April 15, 1991, Crowley's undersigned attorneys forwarded a copy of the District Court's April 8, 1991, Rule 54(b) certificate to the Clerk of this Court.[7]

This Court, on June 18, 1991, dismissed Crowley's appeal for lack of jurisdiction and stated:

> "This appeal is DISMISSED for lack of jurisdiction. The district court's order and judgment entered February 19, 1991, were not final and appealable because they failed to dispose of all the claims of all the parties to the action and the court failed to make an express determination that there was no just reason for delaying the entry of judgment. 28 U.S.C. §1291; Fed.R.Civ.P. 54(b); In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1981))per curiam)."

---

[4] A copy of Barnett Bank's March 13, 1991, motion in the District Court is attached hereto as Exhibit "D".

[5] A copy of Crowley's March 21, 1991, response to Barnett Bank's March 13, 1991, motion is attached hereto as Exhibit "E".

[6] A copy of the District Court's April 8, 1991, Rule 54(b) certificate is attached hereto as Exhibit "F".

[7] A copy of the April 15, 1991, letter from Crowley's undersigned attorneys to the Clerk of this Court is attached hereto as Exhibit "G".

II THE QUESTION PRESENTED

Did the District Court's issuance, on April 8, 1991, of a certificate under Rule 54(b), Federal Rules of Civil Procedure, cure the jurisdictional defect caused by the prematurity of Crowley's March 4,1991, notice of appeal from the District Court's February 19, 1991, judgment?

Based upon the authorities discussed in the next section of this memorandum of law, Crowley respectfully submits that the foregoing question should be answered in the affirmative and that his appeal from the District Court's February 19, 1991, judgment should be reinstated.

III DISCUSSION

A. The Applicable Statute And Rules.

Section 1291, Title 28, U.S. Code, is entitled "Final decisions of district courts" and provides:

> "The courts of appeals (other that the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

Rule 54(b), Federal Rules of Civil Procedure, is entitled "Jugment Upon Multiple Claims or Involving Multiple Parties" and provides:

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer that all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Rule 4(a), Federal Rules of Appellate Procedure, pertains to appeals in civil cases and in pertinent part provides:

"(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from;...

"(2) Except as provided in (a) (4) of this Rule 4, a notice of appeal filed after the commencement of a decision or order but beore the entry of the judgment or order shall be treated as filed after such entry and on the day thereof..."

B. The Decisional Law.

This Court, in In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1982), dismissed consolidated appeals from the District Court's judgments dismissing third party complaints for contribution or indemnity. Noting that the District Court had not made "an express determination that there is no just reason for delay", this Court reasoned:

> "In the cases at bar, the district court entered judgments dismissing Lex Tex's third-party complaints against Leesona, but failed in each case to make any determination that there existed no just reason for delay in allowing appeals to be taken from the dismissal orders. Although the district court is not required, in every case, to express its reasons for concluding that there is no just reason for delay....the district court must exercise its discretion and enter a Rule 54(b) certification determining that there is no just reason for delay and directing entry of judgment before an appeal may be taken. Because the district court did not so exercise its discretion under Rule 54(b), the orders dismissing the third-party complaints are not appealable final judgments. Finding no other basis upon which we may exercise jurisdiction, we must dismiss these appeals for want of jurisdiction."[8]
> (Citation Omitted)

680 F. 2d at 1340.

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[8] This Court, in In re Yarn Processing Patent Validity Litigation, supra, suggested the following post-dismissal course of action:

"The parties are, of course, free to seek new judgments with proper Rule 54(b) certification. In acordance with the procedure utilized by the former Fifth Circuit in General Motors Corp. v. Dade Bonded Warehouse, Inc., 498 F.2d 327 (5th Cir. 1974), on subsequent appeal, 505 F.2d 1305 (5th Cir. 1975), should the district court enter final judgments under Rule 54(b), the parties may, after filing new notices of appeal, request that the appeals from those judgments be submitted on the records and briefs prepared in these actions, supplemented with the new judgments an Rule 54(b) certificates, and on the oral argument previously heard before this panel."

680 F.2d at 1340.

In Metallurgical Industries, Inc. v. Fourtek, Inc., 771 F.2d 915 (5th Cir. 1985), the Fifth Circuit declared:

"When an appellant notices appeal from an interlocutory order and subsequently obtains a certificate pursuant to Fed.R.Civ.P. 54(b) for appeal of the prior order, must a new notice of appeal be filed after entry of the Rule 54(b) order? Our answer: a new notice is not prerequisite to our jurisdiction.

* * * * * *

"Fortunately, we have the holding of Alcorn County, Miss. v. U.S. Interstate Supplies, 731 F.2d 1160 (1984) to support us in giving effect to the premature notice of appeal. This result is in the spirit of Fed.R.App.P. 4(a)(2) and is not contrary to any word of the Rule. When the only object of the Rule 54(b) order is to make the original order appealable, our jurisdiction should be sustainable under several theories..."

771 F.2d at 915-916.

This Court, in United States v. Olavarrieta, 812 F.2d 640 (11th Cir. 1987), stated:

> "In deciding this case, we find that this Court has jurisdiction over the appeal challenging the district court's orders dismissing the third party complaint. Admittedly the orders were not final judgments, and Olavarrieta prematurely filed the notice of appeal. However, because the orders completely dismissed the claims against the University of Florida and the Board of Regents, they were amenable to certification under Fed.R.Civ.P. 54(b). In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338, 1339-40 (11th Cir. 1982). Therefore, the subsequent entry of a final judgment in the case established jurisdiction in this Court without Olavarrieta having to file a new notice of appeal as to those orders..." (Citations omitted)

812 F.2d at 642

In Tidler v. Eli Lilly and Company, Inc., 824 F.2d 84 (D.C. Cir. 1987), the Court of Appeals held that the District Court's certification under Rule 54(b) was sufficient to validate a premature notice of appeal absent a showing of prejudice to the appellee.

The Fifth Circuit, in Crowley Maritime Corporation and Jan C. Rolstad v. Panama Canal Commission, 849 F.2d 951 (5th Cir. 1988), held that Rolstad's premature notice of appeal prior to Rule 54(b) certification conferred jurisdiction upon the appellate court.

Professors Wright, Miller and Kane, in their treatise Federal Practice and Procedure, have observed that:

"Most circuits have rued that [Rule 54(b)] certification is sufficient to validate a premature notice of appeal." Volume 10, §2660 (West. Supp. 1986).

The Supreme Court, in FirsTier Mortgage Co. v. Investors Mortgage Insurance Company, ____U.S. ____, 111 S. Ct. 648 (1991), unanimously held that the district court's bench ruling was a "decision" under Rule 4(a)(2), federal Rules of Appellate Procedure, thereby validating the appellant's premature notice of appeal therefrom. Reversing the Ninth Circuit's dismissal of the appeal of FirsTier Mortgage Co., the Supreme Court, in an opinion written by Justice Marshall, stated:

"This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision- such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure- to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would not be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. In these instances, a li' gant's confusion is understandable, and permitting t e notice of appeal to become effective when judgment is entered does not catch the appellee by surprise. Little would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal...

"Applying this principle to the case at hand, we conclude that the District Court's January 26 bench ruling was a 'decision' for purposes of Rule 4(a)(2). Even assuming that the January 26 bench ruling was not final because the District Court could have changed its mind prior to

entry of judgment, the fact remains that the bench ruling did announce a decision purporting to dispose of all of FirsTier's claims. Had the judge set forth the judgment immediately following the bench ruling, and had the clerk entered the judgment on the docket, see Fed. Rules Civ.Proc.58 and 79(a), there is no question that the bench ruling would have been 'final' under §1291. Under such circumstances, FirsTier's belief in the finality of the January 26 bench ruling was reasonable, and its premature February 8 notice therefore should be treated as an effective notice of appeal from the judgment entered on March 3.

"In reaching our conclusion, we observe that this case presents precisely the situation contemplated by Rule 4(a)(2)'s drafters. FirsTier's confusion as to the status of the litigation at the time it filed its February 8 notice of appeal, FirsTier clearly sought, albeit inartfully, to appeal from the judgment that in fact was entered on March 3. No unfairness to [respondent] IMI results from allowing the appeal to go forward." (Footnotes omitted)

___U.S. at ___, 111 S. Ct. at 653.

IV ARGUMENT

Crowley's March, 1991, notice of appeal was a "reasonable" response, FirsTier Mortgage Company, supra, to the District Court's February 19, 1991, judgment in favor of Barnett Bank because:

(1) The District Court, in its February 19, 1991, order denying Crowley's motion to vacate, directed the Clerk to enter a judgment in Barnett Bank's favor; and

(2) The Clerk, in compliance with the District Court's February 19, 1991, order denying Crowley's motion to vacate, entered a judgment in favor of Barnett Bank "on a separate document", as required byRule 58, Federal Rules of Civil Procedure.

Moreover, under the decisions in Metallurgical Industries, Inc., and Tidler, supra, the District Court's subsequent issuance of a Rule 54(b) certificate cured the jurisdictional deficiency flowing from the prematurity of Crowley's notice of ap, eal and rendered inapplicable the procedure suggested in In re Yarn Processing Patent Validity Litigation, supra, fn. 8.

Finally, Barnett Bank would not be prejudiced by the reinstatement of Crowley's appeal. It was Barnett Bank, not Crowley, which on March 13, 1991, first called to the District Court's attention the absence of "no just reason for delay" language from the February 19, 1991, order denying Crowley's motion to vacate.

V CONCLUSION

This Court possesses jurisdiction of Crowley's appeal from the District court's Febru.ry 19, 1991, judgment in favor of Barnett Bank. Accordingly, Crowley's foregoing motion for rehearing and for reinstatement of his appeal should be granted.

Respectfully submitted,

LAWRENCE R. METSCH, P.A.
Attorneys for Crowley
Suite 200,One Northeast Second Avenue
Miami. Florida 33132-2507
(305) 358-1153

Lawrence R. Metsch
Fla. Bar No. 133162

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing motion and supporting memorandum of law were mailed this 24th day of June, 1991, to the following:

Wayne Thomas, Esq.
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Arthur W. Tifford, Esq.
1385 N.W. 15th Street
Miami, Florida 33125

Mr. Norman Errington
P.O. Box B
Elfers, Florida 34680-0447

LAWRENCE R. METSCH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3210

GERALD J. CROWLEY,

Plaintiff-Appellant,

versus

NORMAN ERRINGTON, EL AL.,

Defendants,

BARNETT BANK OF PASCO COUNTY,
a Florida corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

Before TJOFLAT, EDMONDSON, and COX, Circuit Judges.

BY THE COURT:

Appellant's motion for rehearing and reinstatement of the appeal is denied.

APPENDIX "C"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERALD J. CROWLEY,

Plaintiff,

vs. Case No. 89-410-CIV-T-17(A)

NORMAN ERRINGTON, et al

Defendants.

ORDER ON MOTION TO VACATE

This cause is before the Court on Plaintiff's motion to vacate its January 29, 1990 order striking Count III of Third Amended Complaint, Defendant (Barnett Bank of Pasco County)'s response thereto, and Defendant's motion for final judgment.

Plaintiff is one of two owners of Tele-Mart Programming and Productions, Inc., a corporation which maintained a bank account with Defendant. Plaintiff's complaint in this action is brought as a derivative shareholder action pursuant to Rule 23.1, Fed.R.Civ.P. Counts I and II of the three complaints filed with this Court have been directed against Plaintiff's co-owner, Norman Errington ("Errington"), while Count III in each of Plaintiff's complaints have been directed against Defendant. Count III alleges that Defendant was negligent in allowing Errington, co-owner with Plaintiff and an authorized signatory on the Tele-Mart account, to withdraw monies from the Tele-Mart account, which he then allegedly misappropriated.

On October 31, 1989, this Court applied Defendant's motion to dismiss the First Amended Complaint to the nearly identical Second Amended Complaint and issued an order dismissing Count III of the Second Amended Complaint and dismissing Defendant from the action. Despite this Court's dismissal of Defendant from the action, Plaintiff filed a Third Amended Complaint again asserting the same claim against Defendant without the addition of any new facts to the complaint. Defendant then moved to strike all reference to Barnett Bank of Pasco County as a Defendant in the Third Amended complaint and to strike Count III in its entirety on the grounds that the Court had not given permission for such amendment and that the amendment was therefore unauthorized. Thereafter, on January 28, 1990, this Court granted Defendant's motion to strike.

Plaintiff is now asking this court to vacate its January 29, 1990 order striking Count III of the Third Amended Complaint and to order Defendant to answer Count III of the Third Amended Complaint. As the basis for its motion to vacate, Plaintiff points to the decision in In re: The Guardianship of Catherine S. Medley, ___So.2d___, 15 FLWD3008 (Fla. 2nd DCA 1990) and argues that this decision is an Erie[1] landmark which should control in this diversity lawsuit. While this Court agrees that state substantive law should apply, it cannot agree with Plaintiff's contention that the Medley decision requires this court to vacate its previous order. The Medley decision is completely distinguishable with respect to both the law and facts of this case and this Court finds that decision to be completely inapposite to the instant case.

---

[1]Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938).

In Medley, the accounts in question were joint savings and loan association accounts with right of survivorship held by Mr. and Mrs. Medley. Mr. Medley removed funds from the accounts without Mrs. Medley's consent and then appropriated them to his own use. At some time during these transactions, Mrs. Medley was legally declared incompetent and Southeast Bank was appointed guardian of her property. In its decision, the court held that a joint account owner has a continued interest in the funds of an account when the funds are withdrawn without his or her consent and then misappropriated by the other joint account owner for his or her own use if the account is owned as a tenancy by the entireties or a joint tenancy with right of survivorship, notwithstanding the right of either owner to withdraw from the account. If this occurs, then the one owner has a right to sue the misappropriating co-owner.

The court in Medley also held that there can be a surcharge against a guardian, in that case Southeast Bank, for the guardian's failure to safeguard the continuing interests of the ward in joint tenancy funds of the types described above. The court predicated its decision to surcharge the bank on two factors. First, the accounts had to be held as a tenancy by the entireties or as a joint tenancy with right of survivorship. Second, the bank or individual to be held liable for the surcharge had to be the guardian of the property whose funds were misappropriated and as guardian, they had to be found to have breached their duties and obligations as set forth in Florida Statutes, Section 744.377 (1987). Among the duties of a guardian are to "protect and preserve the property of the ward" and to

"take possession of all the ward's property." See In re: Estate of Pierce, 507 So. 2d 729, 731 (Fla. 4th DCA 1987); Beck v. Beck, 383 So. 2d 268, 271 (Fla. 3d DCA 1980).

In the case before us, the account held with Defendant was a joint commercial account, with both Plaintiff and Errington listed as signatories. It was not a joint account with right of survivorship nor was it joint account held as a tenancy by the entireties since Plaintiff and Errington were not married. Thus, the account in question fails to meet the first criterium set out by the court in Medley in order to hold the guardian liable for a surcharge on the accounts. Moreover, Plaintiff in this case was never declared mentally incompetent and Defendant was at no time appointed guardian of his property. Therefore, since Defendant was not the guardian of the property there is no way that he could be found to have breached a duty to protect and preserve the interests of the plaintiff. In addition, the Court in Medley said nothing to question the general rule that a bank, as a depository institution, has no responsibility to mediate between two signatories on a single account. In fact, that court said nothing about the duties of Southeast Bank as a bank. Rather, the only duties it discussed were those of a guardian of joint accounts held either as a tenancy by the entireties or a joint account with right of survivorship.

Plaintiffs have recently submitted additional supplemental authority which they conclude further supports their motion to vacate. The cases submitted are not new case law and are not applicable with respect to both the law and facts of this case. Thus, this Court finds no compelling reason to further discuss or consider this supplemental authority. Accordingly, it is

ORDERED that Plaintiffs motion to vacate January 29, 1990 order striking Count III of Third Amended Complaint be **denied**; Defendant's motion for final judgment be **granted**, and the Clerk of the Court be **directed** to enter judgment for Barnett Bank of Pasco County.

DONE and **ORDERED** in Chambers, in Tampa, Florida, this 19th day of February, 1991.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

UNITED STATES DISTRICT COURT

Middle District of Florida

Gerald J. Crowley

JUDGMENT IN A CIVIL CASE

v.

Case Number: 89-410-CIV-T-17A

Barnett Bank of Pasco County

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried andthe jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of Barnett Bank of Pasco County and against the Plaintiff Gerald J. Crowley on the claims against Barnett Bank of Pasco County.

February 19, 1991 — David L. Edwards

Date — *Clerk*

APPENDIX "E"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CASE NO. 89-410-CIV-T-17(A)

GERALD J. CROWLEY,
Plaintiff,

v.

NORMAN ERRINGTON, et al.,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Gerald J. Crowley, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment in favor of Defendant Barnett Bank of Pasco County, entered in this action of the 19th day of February, 1991.

LAWRENCE R. METSCH, P.A.
Attorneys for Plaintiff-Appellant
Suite 200
One Northeast Second Avenue
Miami, Florida 33132-2507
(305) 358-1153
Fax: (305) 358-2503

by _____
LAWRENCE R. METSCH
Fla. Bar No. 133162
DATED: February 28, 1991

APPENDIX "F"

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing notice of appeal were mailed this 28th day of February, 1991, to the following:

William L. Grossenbacher, Esq.
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
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P.O. Box 3239
Tampa, Florida 33601

Mr. Norman Errington
518 Bridge Street
New Port Richey, Florida 34652

Arthur W. Tifford, Esq.
1385 N.W. 15th Street
Miami, Florida 33125

LAWRENCE R. METSCH

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERALD J. CROWLEY,

Plaintiff,

vs. CASE NO.89-410-CIV-T-17A

NORMAN ERRINGTON, et al.,

Defendants

BARNETT BANK'S MOTION FOR RULE 54(B) CERTIFICATE

Barnett Bank of Pasco County (Barnett), by and through its undersigned counsel and pursuant to Rule 54(b), Fed.R.Civ.P., moves theCourt to file a Rule 54(b) Certificate directing entry of a final judgment in favor of Barnett and against plaintiff Gerald J. Crowley (Crowley), on Crowley's claim against Barnett, and expressly findng that there is no just reason for delay. The grounds for this motion are set forth with specificity in the memorandum which next follows.

MEMORANDUM

In its order of February 19, 1991, the Court denied the plaintiff's motion to vacate the Court's January 29, 1990 order striking Count III of the third amended complaint, the count of that complaint directed against Barnett, and granted defendant's motion for final judgment, directing the clerk to enter

judgment in favor of Barnett and against plaintiff Gerald J. Crowley on his claims against Barnett. The aforesaid motion for final judgment was a motion pursuant to Rule 54(b) Fed.R.Civ.P. That rule provides that a judgment does not operate as a final judgment when there are multiple claims or multiple parties and the judgment is directed to one or more but fewer than all of the claims or parties unless:

> [there is] an express determination that there is no just reason for delay and.....an express direction for the entry of judgment.

This Court's order expressly directs that the clerk of the court enter judgment for Barnett, but, the order does not make an express determination that there is no just reason for delay. Moore's Federal Practice, § 54.41, notes that the court may make a judgment final and appealable by executing a Rule 54(b) Certificate, which may be done after the judgment is entered and even after the filing of a notice of appeal. The plaintiff has filed a notice of appeal in this action. A sample Rule 54(b) Certificate is attached hereto as an exhibit to this motion. Such a certificate should be executed by this Court to effectuate the Court's clear intent in granting Barnett's Motion for Final Judgment.

Respectfully submitted,

Wayne Thomas
William L. Grossenbacher
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Barnett Bank of pasco County
By: William L. Grossenbacher
Florida Bar No.: 323136

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Lawrence R. Metsch, Esq., Lawrence R. Metsch, P.A., One Northeast Second Avenue, Suite 200, Miami, Florida 33132-3507 and Gregory G. Gay, Esq., Chase and Gay, S. River Road and Orange Street, P.O. Box 1146, New Port Richey, FL 34656-1146; this 13th day of March, 1991.

WILLIAM L. GROSSENBACHER

Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 89-410-CIV-T-17(A)

GERALD J. CROWLEY,

Plaintiff,

v.

NORMAN ERRINGTON, et al.,

Defendants.

PLAINTIFF'S RESPONSE TO
BARNETT BANK OF PASCO COUNTY'S
MOTION FOR RULE 54(b) CERTIFICATE

Plaintiff GERALD J. CROWLEY ("CROWLEY") responds to the March 13, 1991, motion of Defendant BARNETT BANK OF PASCO COUNTY ("BARNETT BANK") for the issuance of a certificate under Rule 54(b), Federal Rules of Civil Procedure, as follows:

APPENDIX "H"

CROWLEY joins BARNETT BANK in requesting that the Court issue a certificate under Rule 54(b), Federal Rules of Civil Procedure.

LAWRENCE R. METSCH, P.A.
Attorneys for CROWLEY
Suite 200, One Northeast Second Ave.
Miami, Florida 33132-2507
(305) 358-1153

by

LAWRENCE R. METSCH
Fla. Bar No. 133162

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing response were mailed this 21st day of March, 1991, to the following:

Mr. Norman Errington
5418 Bridge Road
New Port Richey, Florida 34652

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Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
P.O. Box 3239
Tampa, Florida 33601

Arthur W. Tifford, Esq.
1385 N.W. 15th Street
Miami, Florida 33125

LAWRENCE R. METSCH

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERALD J. CROWLEY,

Plaintiff,

vs. CASE NO. 89-410-CIV-T-17A

NORMAN ERRINGTON, et al.,

Defendants.

RULE 54(b) CERTIFICATE

With respect to the claims of Plaintiff Gerald P. Crowley against Defendant Barnett Bank of Pasco County, determined finally by this Court's Order of February 19, 1990, denying Plaintiff's Motion to Vacate Order Striking Count III of Plaintiff's Third Amended Complaint, and granting Barnett Bank of Pasco County's Motion for Final Judgment, it is CERTIFIED, in compliance with Rule 54(b), Fed.R.Civ.P.:

1. That the Court has directed the entry of final judgment on Plaintiff's claim against the said Defendant; and

2. That the Court has determined, for the reasons set forth in the aforementioned Motion for Final Judgment, that there is no just reason for delay.

ELIZABETH A. KOVACHEVICH
U.S. District Judge

APPENDIX "I"

LAW OFFICES
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LAWRENCE R. METSCH

OF COUNSEL
OSCAR A. WHITE

April 15, 1991

VIA FEDERAL EXPRESS

Hon. Miguel J. Cortez
Clerk of the Court
U.S. Court of Appeals for the
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Crowley v. Errington, et al.,
Barnett Bank of Pasco County,
Case No. 91-3210, U.S. Court of
Appeals for the Eleventh Circuit
Our Mater No. 114-04

Dear Mr. Cortez:

We represent Appellant Gerald J. Crowley in the above styled matter.

Enclosed is a copy of the Rule 54(b) Certificate, dated April 8, 1991, which has been issued by United States District Judge Elizabeth A. Kovachevich in Gerald J. Crowley v. Norman Errington, et al., Case No. 89-410-Civ-T-17(A), U.S. District Court, Middle District of Florida, Tampa Division.

Also enclosed is Appellant's Certificate Of Interested Persons, as required by Eleventh Circuit Rule 28-2(b).

Sincerely yours,

Lawrence R. Metsch

Enclosures
CC: Mr. Norman Errington
William L. Grossenbacher, Esq.

(2)

No. 91-833

In The

Supreme Court of the United States

October Term, 1991

GERALD J. CROWLEY,

Petitioner,

v.

BARNETT BANK OF PASCO COUNTY,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WAYNE THOMAS
WILLIAM L. GROSSENBACHER
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
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QUESTION PRESENTED

DID THE ELEVENTH CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS OR WITH RULE 4(a)(2), FEDERAL RULES OF APPELLATE PROCEDURE?

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STATEMENT OF THE CASE

Respondent, Barnett Bank of Pasco County[1] agrees with the Petitioner's statement.

SUMMARY OF ARGUMENT

Petitioner filed a notice of appeal from a judgment which had not been entered in compliance with Rule 54(b). Subsequent to that time, and before the appeal was dismissed, a Rule 54(b) Certificate was issued by the District Court. Petitioner infers, from the Circuit Court's dismissal of his appeal, that the court ruled that the subsequent issuance of a Rule 54(b) Certificate would not validate a notice of appeal filed after the entry of judgment, but before the entry of a Rule 54(b) Certificate, and suggests that this Court should exercise its certiorari jurisdiction because such a holding conflicts with the holdings of other circuit courts. However, the Eleventh Circuit's opinion does not even address the question of the District Court's late Rule 54(b) certification. Given that fact, and the fact that there may have been other grounds for the Eleventh Circuit's ruling, Barnett Bank would suggest to this Court that it is inappropriate to exercise its certiorari jurisdiction, where, in fact, no conflict may exist.

---

[1] Barnett Bank of Pasco County is a wholly owned subsidiary of Barnett Banks, Inc. Barnett Banks, Inc. is a publicly traded corporation whose address is Post Office Box 988, Jacksonville, Florida 32231. Barnett Bank of Pasco County has no subsidiaries. Barnett Bank of Pasco County will be hereinafter referred to as Barnett Bank.

Petitioner also suggests that Rule 4(a)(2), Fed.R.App.P., clearly applies to validate a premature notice of appeal when a Rule 54(b) Certificate is filed after that premature notice of appeal, but before the dismissal of the appeal. However, this Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Company*, ___ U.S. ___, 111 S.Ct. 648 (1991) indicates that Rule 4(a)(2) would not apply to the instant situation, where an announced ruling was followed immediately by the entry of judgment, and that judgment was not appealable at the time it was entered.

ARGUMENT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT BECAUSE IT DID NOT ADDRESS THE QUESTION OF WHETHER THE SUBSEQUENT ENTRY OF A RULE 54(b) CERTIFICATE WOULD SERVE TO RIPEN AND SAVE A PREMATURELY FILED NOTICE OF APPEAL.

This Court should not exercise its certiorari jurisdiction to review the Eleventh Circuit Court of Appeals' dismissal of Petitioner's appeal because the opinion dismissing that appeal makes no statement conflicting with the decisions of any other circuits. Petitioner filed a notice of appeal from the District Court's judgment in favor of Barnett Bank and against him. That judgment did not determine all the claims in the case, and, while it was expressly directed by the court, the court had not stated

that there was no just reason for delay pursuant to Rule 54(b), Federal Rules of Civil Procedure.

Because the District Court subsequently entered a Rule 54(b) Certificate, prior to the Eleventh Circuit's dismissal of the case, the Petitioner infers that the Eleventh Circuit ruled that a Rule 54(b) certification is insufficient to validate a premature notice of appeal. That inference is not warranted.

Indeed, the decision of the Eleventh Circuit makes no statement about Rule 54(b) Certificates entered after the filing of a notice of appeal. The entire text of that per curiam dismissal is as follows:

> This appeal is dismissed for lack of jurisdiction. The district court's order and judgment entered February 19, 1991, were not final and appealable because they failed to dispose of all the claims of all the parties to the action and the court failed to make an express determination that there was no just reason for delaying the entry of judgment. 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); *In re Yarn Processing Patent Validity Litigation*, 680 F.2d 1338 (11th Cir. 1982) (*per curiam*).

Barnett Bank respectfully suggests that this Court should not exercise its certiorari jurisdiction to cure a conflict which exists only by inference, and may not exist in fact. The decision of the Eleventh Circuit does not state that a subsequently entered Rule 54(b) Certificate would not validate a prematurely filed appeal, but simply states the uncontestable fact that the District Court's order and judgment entered February 19, 1991 were not final and appealable.

Thus, it may well be that the reasoning suggested by the Petitioner had no part in the Eleventh Circuit's dismissal of Petitioner's appeal. It is possible, for example, that the Eleventh Circuit determined that the reasons adduced by the District Court for its statement that there was no just reason for delay were inadequate. In its Rule 54(b) Certificate, the District court stated that there was no just reason for delay "for the reasons set forth in [Barnett Bank's] Motion for Final Judgment." Clearly, a Circuit Court may review a District Court's certification and determine that the District Court abused its discretion in certifying an appeal, and then dismiss that appeal. *See, e.g., Pahlavi v. Palandjian,* 744 F.2d 902 (1st Cir. 1984), *U.S. General, Inc. v. Albert,* 792 F.2d 678 (7th Cir. 1986).

Given the fact that the opinion of the Eleventh Circuit does not make any statement in conflict with the rulings of other circuit courts that a Rule 54(b) Certificate validates a prematurely filed notice of appeal and the fact that there may be alternate reasons for that decision, this Court should decline to exercise certiorari jurisdiction to cure a conflict which may not exist.

II. RULE 4(a)(2), FEDERAL RULES OF APPELLATE PROCEDURE, DOES NOT PROVIDE THAT A RULE 54(b) CERTIFICATE FILED AFTER THE ENTRY OF JUDGMENT AND A NOTICE OF APPEAL FROM THAT JUDGMENT WOULD VALIDATE THE PREMATURE NOTICE OF APPEAL.

Petitioner suggests that Rule 4(a)(2), Fed.R.App.P., mandates that the subsequent entry of a Rule 54(b) Certificate, after the filing of a premature notice of appeal,

validates that notice of appeal. He supports that argument by citing this Court's opinion in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Company*, ___ U.S. ___, 111 S.Ct. 648 (1991). However, the situation presented therein is not, contrary to Petitioner's statement, analogous to the instant case, and in fact, this Court's ruling in that case appears to negate Petitioner's argument. In that case, this Court stated the following:

> In our view, Rule 4(a)(2) permits a notice of appeal from a non-final decision to operate as a notice of appeal from a final judgment *only* when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. (emphasis supplied).

Clearly, that statement would exclude the instant situation. Here, the District Court announced a decision in its order of February 19, 1991 that *was immediately followed* by the entry of judgment, and Petitioner does not contest the fact that that judgment, as entered, was not an appealable judgment, because the court had not certified that there was "no just reason for delay."

Thus, *FirsTier* is completely inapplicable. The announced ruling was followed by the entry of judgment, and that judgment, nevertheless, was non-final at the time it was entered. Therefore, the Eleventh Circuit's ruling did not controvert Rule 4(a)(2).

CONCLUSION

For the reasons set forth above, Barnett Bank requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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